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No. 84-468

# In The Supreme Court of the United States

## OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,

*Petitioners,*

v.

CLEBURNE LIVING CENTER, et al.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

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### I. THE DECISION OF THE FIFTH CIRCUIT IN THIS CASE IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN *MACON ASSOCIATION FOR RETARDED CITIZENS V. MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION*

On October 1, 1984, after the filing of Petitioners' Application for a Writ of Certiorari on September 22, 1984, this Court dismissed the appeal for want of a substantial federal question in *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*, 314

S.E.2d 218 (Ga. 1984), appeal dismissed, 53 U.S.L.W. 3205 (October 1, 1984). One of the questions presented to this Court on appeal was:

> Did Georgia Supreme Court err in applying rational basis test for examining equal protection claim generated by denial of housing permit to home for mentally retarded in that stricter standard of scrutiny should have been applied?

53 U.S.L.W. 3191 (September 25, 1984). The Fifth Circuit's decision in the instant case is in direct conflict with this Court's decision in the *Macon Association* case regarding the level of scrutiny for Equal Protection analysis to be applied to a zoning ordinance which affects mentally retarded persons. This Court's dismissal of the appeal for want of a substantial federal question constitutes a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289 (1975).

The *Macon Association* case is almost a direct parallel to the case at bar. It involved a zoning resolution (ordinance) that established "permitted" uses and "conditional" uses of the land in each zoning district. The "conditional" use is akin to the special use permit in the present case, which permits the use in certain circumstances after a hearing on the proposed use. The Macon-Bibb County zoning resolution (ordinance) provided for a "conditional" use permit for homes for the mentally retarded in certain zoning districts, but not in the single-family residential zoning districts. The Macon Association for Retarded Citizens applied for an amendment to the zoning resolution (ordinance) in order to permit the construction of two group homes for mentally retarded persons in the single-family residential zones. Petitioners before the Supreme Court of Georgia asserted

that application of the rational-relation test for Equal Protection analysis of the ordinance was improper since they asserted that mentally retarded persons constitute at least a "quasi-suspect" class thereby being entitled to a middle-tier level of review. *Macon Association, supra,* at 220. The Supreme Court of Georgia affirmed the decision of the Georgia Superior Court in its application of the rational-relation test to the resolution (ordinance), even though "[i]t is true that the Resolution does contain separate classification for mentally ill or retarded individuals." *Macon Association, supra,* at 221. An appeal was taken in *Macon Association,* and this Court dismissed the appeal from the Georgia Supreme Court decision for want of a substantial federal question, thereby creating a direct conflict with the Fifth Circuit decision in the present case holding that the mentally retarded are a "quasi-suspect" class entitled to mid-level scrutiny of a zoning ordinance.

## II. THE IMPACT OF THE FIFTH CIRCUIT DECISION IN THIS CASE IS OF NATONAL IMPORTANCE.

Respondents' brief in opposition states that the decision of the Fifth Circuit "is a relatively narrow one" and attempts to limit the scope of this case to a particular alleged act of discrimination and to the parties involved. (Br. in Opp. p. 6-7). On the contrary, the Fifth Circuit's decision has far-reaching precedent for all governmental entities whose legislation[1] may even remotely impact the mentally retarded. The Fifth Circuit's characterization of the mentally retarded as "quasi-suspect" calls into question all legislation regarding the mentally retarded and opens the door for a plethora of

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[1]The term "legislation" is used in this Reply as being inclusive of agency regulatory action or other governmental promulgations as well as legislation.

challenges to state, municipal, school and federal law. The Fifth Circuit's decision is not restricted to a particular municipality or a particular group of retarded persons. Rather, the Fifth Circuit laid the foundation for a holding of national significance when the Court became the first Circuit Court of Appeals to determine "mentally retarded persons are . . . a 'quasi-suspect' class and that laws discriminating against the mentally retarded should be given intermediate scrutiny." *Cleburne Living Center, Inc., et al. v. City of Cleburne, Texas, et al.*, 726 F.2d 191, 198 (5th Cir. 1984); Appendix C-16. There is no language in the Fifth Circuit Panel's opinion which seeks to limit the holding to a particular municipality or a particular group of mentally retarded individuals.

If the Fifth Circuit's decision recognizing a heightened level of judicial scrutiny is allowed to stand, zoning or any legislation which affects the mentally retarded will be subject to an Equal Protection challenge. Such heightened review may prove equally detrimental as beneficial to the mentally retarded since it will also be applied to legislation intended to benefit them but requiring a discriminatory approach for that benefit. See *Cleburne Living Center, Inc., et al. v. City of Cleburne, Texas et al.*, 735 F.2d 832,, 833-834 (5th Cir. 1984); Appendix D-4, D-5.

The conflicting decisions on this issue between the Fifth Circuit decision, this Court's decision in *Macon Association, supra*, and the circuit decisions in *California Association of the Physically Handicapped, Inc. v. Federal Communications Commission*, 721 F.2d 667 (9th Cir. 1983), and in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981), will require litigation on this matter until this Court does resolve the level of review to be accorded legislation affecting the mentally retarded.

## III. THE CITY DID NOT DISCRIMINATE AGAINST THE MENTALLY RETARDED

This case is not, as Respondents state at p. 3 of their Brief in Opposition, "a zoning case about whether a city may exclude mentally retarded persons from a community." The ordinance does not even address itself to mentally retarded persons who live within the city. The ordinance addresses itself to the business of providing a group home for mentally retarded persons. Furthermore, the home may be located anywhere in the city by means of a special use permit. This *is* a zoning case regarding whether or not an intended use at a particular location was an appropriate use for that location, and the City Council determined, for a number of reasons, that it was not.

The Respondents are also incorrect in their assertion that the City "misstates the facts and claims for the first time that the residents' mental retardation was irrelevant to its treatment of the group home as an unpermitted use." (Br. in Opp. p. 3). On the contrary, the Petitioners have stated at trial, in their Petition for Rehearing to the Fifth Circuit, as well as in their Petition for a Writ of Certiorari at p.4 that

> "[o]ne of the prime reasons for the denial of the special use permit was that the structure was not appropriate for its intended use of housing fifteen people — nor would it be appropriate as a boarding house for that many people.

Furthermore, the District Court determined in its Finding of Fact 34 that "the size of the home and the number of people to be housed" was a factor in the decision of the members of the City Council of Cleburne to deny the Respondents a special use permit for the house at 201

Featherston St. See District Court Opinion Finding of Fact 34 at pp. 9-10. Appendix A-8.

The District Court's Finding of Fact 34 was based on the testimony that one of the reasons City Councilman Alfred Johns voted to deny the special use permit was because he did not think the property was large enough for the requested facility at 201 Featherson St. (R. Vol. 1, p. 30), and because he did not think the property was large enough to afford recreation for at least thirteen mentally retarded persons, (R. Vol. 1, p. 34). City Councilman Arval Martin also stated that the location of a facility for the mentally retarded was inappropriate because the yard was too small. (R. Vol. 1, p. 42). City Councilman J. T. Bass also testified that the property was not adequate for the use it was intended. (R. Vol. 1, p. 17).

As the Petitioners have stated throughout the course of these proceedings, the City of Cleburne ordinance only establishes a permitted land use at a specific location; it does not confer appropriateness for that use on whatever structure may exist at that location. The structure at 201 Featherston St. is nothing more than a 2510 square foot frame house with four bedrooms and two baths and as such it could not function as a boarding house for fifteen unrelated adult men and women. The ordinance does not confer on this structure the required characteristics of a boarding house or a hospital, which is also a permitted use for this location. The inherent requirements of the intended use of a structure, not the zoning permission, are the determinant factors in establishing the appropriateness of the structure in question. In some instances, the City determines that a structure is appropriate for its intended use by means of its building code and occupancy permits, and in certain other instances, such as nurseries and residential care facilities for the

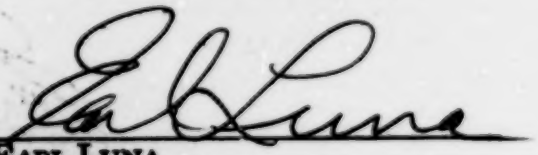
mentally retarded, the special use permit is the City's mechanism to determine the appropriateness of the intended use of a structure such as the house at 201 Featherson St. The denial of the special use permit did not establish that a residential facility for mentally retarded persons could not exist on the land located at 201 Featherston St. at all; rather, it established that the use of the particular structure located there was not appropriate for the intended use of housing fifteen unrelated adult men and women. It has nothing to do with discrimination.

## CONCLUSION

For the foregoing reasons as well as those stated in their Petition for a Writ of Certiorari, Petitioners pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.

By: 

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## PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for Petitioners herein in all proceedings in which they have been involved in the Courts below.

I further state upon oath that on the 30 day of November, 1984, I served copies of the foregoing Reply Brief for Petitioners by depositing the same in the United States mail, with first-class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. Renea Hicks and Ms. Diane Shisk, Advocacy, Inc., 1006 East 50th Street, Austin, Texas 78751.

Earl Luna

Earl Luna

SUBSCRIBED AND SWORN To before me by the said Earl Luna, on this the 30 day of November, 1984.

Betty Jarratt
Notary Public, State of Texas
My commission expires 11/30/84